

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL ERIAS STELLY, SR., ) No. C 08-01997 CW (PR)  
Plaintiff, ) ORDER DISMISSING COMPLAINT WITH  
v. ) LEAVE TO AMEND  
DR. ELAINE TOOTELL, et al., )  
Defendants. )  
\_\_\_\_\_ )

## INTRODUCTION

Plaintiff Paul Erias Stelly, Sr., a state prisoner incarcerated at San Quentin State Prison (SQSP), has filed the present pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging that prison officials at SQSP were deliberately indifferent to his medical needs. His motion for leave to proceed in forma pauperis has been granted.

Venue is proper in this district because the acts complained of occurred at SQSP, which is located in Marin County. 28 U.S.C. §§ 84(a), 1391(b).

## BACKGROUND

Plaintiff states that he suffers from "reoccurring and severe bouts of depression" as well as "seizure related episodes." (Compl. at 3-5.) He alleges that Defendants were deliberately indifferent to his serious medical needs because he was deprived of psychiatric and medical treatment, beginning in February, 2008. (Id.)

1 Plaintiff alleges that the failure to provide him with  
2 psychiatric and medical treatment "caused prolonged escalation in  
3 the frequency and severity of [his] condition(s)." (Id.) Thus,  
4 Defendants' actions amounted to deliberate indifference to his  
5 serious medical needs. He names the following as Defendants: SQSP  
6 Chief Medical Officer Elaine Tootell; SQSP Head of Psychiatric  
7 Department Larry Dizman; SQSP Head of Mental Health and Chief  
8 Psychologist E. Monthei; and SQSP Acting Health Care Receiver  
9 Manager Timothy Rougeux. He seeks injunctive relief and monetary  
10 damages.

11 DISCUSSION

12 I. Exhaustion of Administrative Remedies

13 The Prison Litigation Reform Act of 1995 (PLRA) amended 42  
14 U.S.C. § 1997e to provide that "[n]o action shall be brought with  
15 respect to prison conditions under [42 U.S.C. § 1983], or any other  
16 Federal law, by a prisoner confined in any jail, prison, or other  
17 correctional facility until such administrative remedies as are  
18 available are exhausted." 42 U.S.C. § 1997e(a).

19 Exhaustion is mandatory and no longer left to the discretion  
20 of the district court. Woodford v. Ngo, 126 S. Ct. 2378, 2382  
21 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).  
22 "Prisoners must now exhaust all 'available' remedies, not just  
23 those that meet federal standards." Id. The PLRA's exhaustion  
24 requirement requires "proper exhaustion" of available  
25 administrative remedies. Id. at 2387.

26 An action must be dismissed unless the prisoner exhausted his  
27 available administrative remedies before he or she filed suit, even  
28

1 if the prisoner fully exhausts while the suit is pending. McKinney  
2 v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); see Vaden v.  
3 Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006) (where  
4 administrative remedies are not exhausted before the prisoner sends  
5 his complaint to the court it will be dismissed even if exhaustion  
6 is completed by the time the complaint is actually filed).

7 If the court concludes that the prisoner has not exhausted  
8 non-judicial remedies, the proper remedy is dismissal without  
9 prejudice. Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003).  
10 A prisoner's concession to non-exhaustion is a valid ground for  
11 dismissal, so long as no exception to exhaustion applies. Id.  
12 Accordingly, a claim may be dismissed without prejudice if it is  
13 clear from the record that the prisoner has conceded that he did  
14 not exhaust administrative remedies. See id.

15 The State of California provides its inmates and parolees the  
16 right to appeal administratively "any departmental decision,  
17 action, condition or policy perceived by those individuals as  
18 adversely affecting their welfare." See Cal. Code Regs. tit. 15,  
19 § 3084.1(a). It also provides its inmates the right to file  
20 administrative appeals alleging misconduct by correctional  
21 officers. See id. § 3084.1(e). In order to exhaust available  
22 administrative remedies within this system, a prisoner must proceed  
23 through several levels of appeal: (1) informal resolution,  
24 (2) formal written appeal on a 602 inmate appeal form, (3) second  
25 level appeal to the institution head or designee, and (4) third  
26 level appeal to the Director of the California Department of  
27 Corrections and Rehabilitation (CDCR). See id. § 3084.5; Barry v.  
28

1 Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies  
2 the administrative remedies exhaustion requirement under §  
3 1997e(a). See id. at 1237-38.

4 Here, the deliberate indifference claims raised in Plaintiff's  
5 complaint appear not to have been exhausted through the  
6 administrative grievance procedure. Plaintiff states that he filed  
7 inmate appeal forms or 602 appeals. (Compl. at 3-5.) However,  
8 Plaintiff fails to specify whether he exhausted his available  
9 administrative remedies before he filed suit. Because Plaintiff  
10 did not attach the Director's level decision, the Court is unable  
11 to determine if Plaintiff satisfied the administrative remedies  
12 exhaustion requirement by receiving the Director's level decision  
13 prior to filing his suit. Therefore, it appears from the face of  
14 the complaint that Plaintiff has not exhausted his administrative  
15 remedies.

16 Accordingly, the complaint is DISMISSED with leave to amend.  
17 Within thirty (30) days from the date of this Order, Plaintiff  
18 shall inform the Court whether he exhausted his administrative  
19 remedies with respect to the deliberate indifference claims in his  
20 complaint before he filed his suit. If Plaintiff fails to comply  
21 with this Order, the action will be dismissed without prejudice.

22 II. Named Defendants

23 Plaintiff must allege facts sufficient to show that  
24 Defendants' actions rise to the level of constitutional violations.  
25 As mentioned above, he is attempting to hold Defendants Tootell,  
26 Dizman, Monthei and Rougeux liable for being deliberately  
27 indifferent to his serious medical needs; therefore, he must allege  
28

1 facts showing what each defendant did that violated his  
2 constitutional rights. See Leer v. Murphy, 844 F.2d 628, 634 (9th  
3 Cir. 1988) (sweeping conclusory allegations will not suffice; the  
4 plaintiff must instead set forth specific facts as to each  
5 individual defendant's actions which violated his or her rights).

6 Plaintiff seems to be alleging that the named Defendants are  
7 liable as supervisors. If so, he must allege that these Defendants  
8 "participated in or directed the violations, or knew of the  
9 violations and failed to act to prevent them." Taylor v. List, 880  
10 F.2d 1040, 1045 (9th Cir. 1989). A supervisor may be liable under  
11 § 1983 upon a showing of personal involvement in the constitutional  
12 deprivation or a sufficient causal connection between the  
13 supervisor's wrongful conduct and the constitutional violation.  
14 Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991)  
15 (en banc) (citation omitted). A supervisor therefore generally "is  
16 only liable for constitutional violations of his subordinates if  
17 the supervisor participated in or directed the violations, or knew  
18 of the violations and failed to act to prevent them." Taylor, 880  
19 F.2d at 1045. A supervisor may be liable for implementing "a  
20 policy so deficient that the policy itself is a repudiation of  
21 constitutional rights and is the moving force of the constitutional  
22 violation." Redman, 942 F.2d at 1446; see Jeffers v. Gomez, 267  
23 F.3d 895, 917 (9th Cir. 2001).

24 CONCLUSION

25 For the foregoing reasons, the Court orders as follows:

26 1. Within thirty (30) days from the date of this Order,  
27 Plaintiff may file an amended complaint as set forth above,  
28

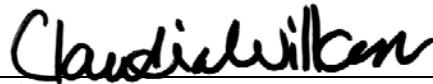
1 clarifying the results of his complete exhaustion of administrative  
2 remedies and naming as Defendants those who personally participated  
3 in the alleged violation of his rights. Plaintiff must use the  
4 attached civil rights form, write the case number for this action -  
5 - Case No. C 08-1997 CW (PR) -- on the form, clearly label the  
6 complaint "Amended Complaint," and complete all sections of the  
7 form. Because an amended complaint completely replaces the  
8 original complaint, Plaintiff must include in it all the claims he  
9 wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262  
10 (9th Cir.), cert. denied, 506 U.S. 915 (1992); King v. Atiyeh, 814  
11 F.2d 565, 567 (9th Cir. 1987); London v. Coopers & Lybrand, 644  
12 F.2d 811, 814 (9th Cir. 1981). He may not incorporate material  
13 from the original complaint by reference. Plaintiff's failure to  
14 file an amended complaint will result in the dismissal of this  
15 action without prejudice for failure to exhaust administrative  
16 remedies.

17 2. It is Plaintiff's responsibility to prosecute this case.  
18 Plaintiff must keep the court informed of any change of address and  
19 must comply with the Court's Orders in a timely fashion. Failure  
20 to do so may result in the dismissal of this action for failure to  
21 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

22 3. The Clerk of the Court shall send Plaintiff a blank civil  
23 rights form along with a copy of this Order.

24 IT IS SO ORDERED.

25 DATED: 11/25/08

26   
27 CLAUDIA WILKEN  
28 United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

PAUL E STELLY SR,

Plaintiff,

Case Number: CV08-01997 CW

V.

ELAINE TOOTELL et al,

Defendant.

## **CERTIFICATE OF SERVICE**

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on November 25, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
located in the Clerk's office.

15 Paul Erias Stelly F86444 w/CR form  
San Quentin State Prison  
16 San Quentin, CA 94974

17 | Dated: November 25, 2008

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk